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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 287

ARTIM TRANSPORTATION SYSTEM, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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WO. 2-8745—WO. 2-8732

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Petitioner, Artim Transporation System, Inc., petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit in this case on March 19, 1970 enforcing an Order of the National Labor Relations Board.

OPINIONS BELOW

The decision of the Court of Appeals has not, as yet, been reported. The decision and order of the National Labor Relations Board is reported at 174 NLRB No. 40.

JURISDICTION

The decision of the Court of Appeals was rendered on February 12, 1970 and a decree was entered on March 19, 1970. Petitioner's timely Motion for a Rehearing was denied on February 26, 1970. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are as follows:

> Sec. 7. Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. * * *
>
> Sec. 8 (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of the title 28, United States Code. Upon the filing of such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

QUESTION PRESENTED

The issue here is whether the Court of Appeals properly exercised its responsibility in conducting its review of the decision of the National Labor Relations Board.

STATEMENT

The Petitioner is engaged in the interstate trucking and cartage business as a common carrier of iron and steel and other general products. Everett Batcheller, the employee involved in the instant matter, was employed by the company as a truck driver. On November 30, 1967 Batcheller was discharged for the theft of company tarpaulins. Batcheller filed a grievance with the Union protesting the discharge. The grievance was rejected by the Joint Employer-Union Grievance Committee. The Board issued an unfair labor practice charge. The Trial Examiner found that the company violated Sec. 8(a)(1) and (3) of the Act by unlawfully discharging Batcheller because he engaged in Union and other protected activity. The Board adopted the findings of the Trial Examiner in making its decision.

ARGUMENT

The Board's petition for enforcement was addressed to the discretion of the court below which "shall have power to . . . make and enter . . . a decree enforcing, modifying, . . . or setting aside in whole or in part the order of the Board", 29 U.S.C. §160 (e). In granting the foregoing

power, Congress charged the Court of Appeals with the normal and primary responsibility for granting or denying enforcement of orders of the NLRB, *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498. The Court of Appeals has the discretion under Section 10 (e) of the Act to dismiss the Board's petition for enforcement on the basis of the facts in the record before it. The fact that orders of the Board are not self-enforcing is a further indication of the intent of Congress to give the Court of Appeals great responsibility with regard to the enforcement of Board orders. In *Universal Camera Corporation v. National Labor Relations Board* 340 U.S. 474, 490-491, the Court described the responsibility of the Court of Appeals in enforcing Board orders in the following terms,

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

The report of the Trial Examiner is as much a part of the record to be considered as the complaint, or the testi-

mony. According to the Administrative Procedure Act, "all decisions (including initial, recommended, or tentative decisions) shall become a part of the record . . . ." §8(b), 60 Stat. 242, 5 U.S.C. §1007 (b).

> "We found that this Act's provision for judicial review has the same meaning as that in the Taft-Hartley Act. The similarity of the two statutes in language and purpose also requires that the definition of 'record' found in the Administrative Procedure Act be construed to be applicable as well to the term 'record' as used in the Taft-Hartley Act.
>
> It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report."
>
> *Universal Camera Corp. v. NLRB, Supra* at 493.

Substantial evidence on the record as a whole does not support the Board's finding adopted by the Court of Appeals, that the company violated Section 8(a)(1) and (3) of the Act by discharging the employee in question because of his union and other protected activities.

The evidence put forth by the company totally refuted the Board's charges of discrimination practiced against Batcheller. The Court of Appeals failed to fully address itself to the issues raised by the Petitioner because the Court simply reiterated the conclusions of fact drawn by the Trial Examiner without apparently going into the complete evidence from which the conclusions of fact were drawn.

The crux of this issue is the Petitioner's motive in discharging Everett Batcheller. It is the Petitioner's position that Batcheller's discharge was necessitated by the theft

by him of one of the company tarpaulins used to cover loads of steel in transit. The Court of Appeals for the 7th Circuit in adopting the Decision and Order of the Board stated that the employee involved contacted the Interstate Commerce Commission and "apparently succeeded in causing an I.C.C. investigation." However, the Court of Appeals did not mention, and perhaps did not even take notice, of the fact that Batcheller and 75% of the company's city division drivers received reprimands for the intentional falsification of I.C.C. logs, thus negating any showing of discrimination practiced upon Batcheller. The statement of the Court of Appeals in its Decision regarding an I.C.C. investigation being launched by Batcheller's complaint, is pure conjecture on the part of the Court.

A second instance of alleged discrimination which the Court of Appeals saw fit to mention in its opinion, was that the Company assigned Batcheller to "operate old and run-down trucks." The Court did not mention the evidence presented by the company which clearly demonstrated that Batcheller's position at the time, was that of driving vacation traffic, meaning that he drove the trucks of men who were on vacation. Thus, it was the nature of his job to drive several different tractors rather than a single tractor.

The witness called by the Counsel for the General Counsel to identify the particular truck in question which Batcheller had characterized as "junk" had a great deal of difficulty in identifying the truck in photographs shown him. Furthermore, the witness' credibility is subject to grave doubt since he had recently been discharged from the company and might have harbored resentment against it. The truck in question had been in service all during the period involved and was being used by other drivers, as

well as Batcheller. Thus, it may be seen, that evidence presented by the company directly contradicts Batcheller's mere statement. At the very least, evidence on this issue is in conflict, yet, by citing this incident in its opinion, the Court of Appeals must have given it great weight in determining the question whether there is substantial evidence on the record as a whole to support the Board's decision.

The Court stated that the company reduced Batcheller's hours of overtime in discriminating against him. However, witnesses for the company testified that Batcheller worked approximately the same hours as the other drivers. Company log books were introduced into evidence which demonstrated that Batcheller worked no less than 42¼ hours per week with a high point of 59¼ hours of work. These logs clearly demonstrate that he did indeed engage in a great deal of overtime work. In fact, a witness testified that Batcheller's working hours were above the average of the other city division drivers. The Counsel for the General Counsel could have subpoenaed further hourly log records but he chose not to do so. Therefore, the evidence involving Batcheller's overtime work consists of his bare statement as opposed to the witness called by the company and the company log books. Thus, it may be seen that this charge of discrimination cannot be substantiated.

The Court of Appeals also stated that the Company discriminated against Batcheller "by various other means," but failed to identify and establish what these "other means" consisted of. This language makes it impossible for the Petitioner to know just what facts the Court considered in arriving at its decision. The Court of Appeals has not fulfilled its function of conducting a thorough and complete review of the Decision and Order of the Board, but instead has merely acceded to its decision. It is true that the Court should be slow to overturn an administrative

decision, *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 US 105, 112, 76 S Ct. 679, 100 L.Ed. 975, but they are not left to sheer acceptance of the Board's decision. Reviewing Courts are not obliged to stand aside and rubber stamp their affirmance of administrative decisions, but have the right to delve into the evidence presented themselves to see whether or not there is substantial evidence on the record as a whole to support the Board's decision.

On the question of burden of proof in discharge cases, the General Counsel has the burden of proving affirmatively by substantial evidence that there was discrimination violative of the Act. In these cases, it is not up to the employer to prove non-discrimination, *Indiana Metal Products v. NLRB*, 31 LRRM 2490 (CA 7, 1953), *NLRB v. Kaiser Aluminum Corp.*, 34 LRRM 2412 (CA 9, 1954). It was not incumbent upon the Company to advance a legitimate business purpose because the conduct involved did not carry its own indicia of intent. *National Labor Relations Board v. Erie Resistor Co.*, 373 U.S. 221. It was incumbent upon the Board to advance some evidence of illegal intent or purpose and this has not been done. Instead the Board conjectured that the employer's conduct was retaliation against Batcheller and on the basis of such conjecture the Company was adjudged guilty of the 8(a)(1) and (3) violation. When the evidence in an unfair labor practice proceeding against an employer is such that the Board could as reasonably infer a proper motive as an unlawful one, the unfair labor practice has not been established by substantial evidence, *NLRB v. Houston Chronicle Publishing Co.*, 33 LRRM 2847 (CA 5, 1954). It is submitted that this is precisely the situation in this case.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Law Offices

GEORGE GREGORY MANTHO
Professional Corporation

George Gregory Mantho,
Attorney for Petitioner

Dated:

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

National Labor Relations Board, *Petitioner*, v. Artim Transportation System, Inc., *Respondent*.	On Application for Enforcement of an Order of the National Labor Relations Board.

DECISION

February 12, 1970

Before Hastings, *Senior Circuit Judge*, Cummings and Kerner, *Circuit Judges*.

Per Curiam. This matter is before us on application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C.A. §151 et seq., §160(e), for enforcement of its Order dated January 27, 1969, and reported at 174 NLRB No. 40.

By such Order, the Board directed respondent Artim Transportation System, Inc. (Company) to cease and desist from discouraging membership in labor organizations by discharging or discriminating against any of its employees because of their participation in protected activities. Affirmatively, the Board ordered the Company to offer reinstatement to a former employee, Everett W. Bat-

cheller, allegedly discharged because of his union and other protected activity. The Company was also directed to post the usual notices.

Briefly, the record discloses that Batcheller was employed as a truck driver by the Company and was a member of Local 142, International Brotherhood of Teamsters. Batcheller was something of a self-styled crusader for the rights of others and on several occasions circulated letters and petitions protesting Company treatment of himself and other employees. On one occasion, Batcheller contacted the Interstate Commerce Commission in connection with a problem he was having with the Company and apparently succeeded in causing an I.C.C. investigation.

On several occasions, the Company allegedly took discriminatory action against Batcheller by assigning him to operate old and rundown trucks, by reducing his overtime and by various other means.

In October, 1967, Batcheller was hospitalized and off work. While he was home convalescing, the Company's chief dispatcher "stumbled on" to Batcheller's rural home while supposedly chasing ducks in a car. He looked around the place but did not make his presence known. A few days later, he returned with the Company's personnel supervisor and took pictures of some tarpaulins around the Batcheller home. The men went in to see "good old Batch" but said nothing of the purpose of their visit. About a week later, the men returned with two sheriff's detectives and attempted to identify the tarpaulins as Company property. Batcheller denied they were Company property and offered an explanation of how and where he got them. The evidence concerning the identification of the tarpaulins was in conflict.

About a week later, just before Batcheller was scheduled to return to work, he was notified that he was being discharged for stealing Company tarpaulins.

The single question for our consideration is whether substantial evidence on the record as a whole supports the finding of the Board that the Company violated Section 8(a) (3) and (1) of the Act by discharging Batcheller because of his union and other protected activities, rather than because of the alleged theft. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951).

From our review of the record before us and on consideration of the briefs and the oral argument of the parties, we find and hold the Board's conclusion concerning the Company's motive for Batcheller's discharge to be supported by substantial evidence on the record considered as a whole.

We are in agreement with and adopt the decision and order of the Board reported at 174 NLRB No. 40, and on this authority we grant the Board's petition for enforcement.

Enforcement Granted.

APPENDIX B

United States of America

Before The

NATIONAL LABOR RELATIONS BOARD

Arlim Transportation System, Inc.

and

Everett W. Batcheller, Individual

DECISION AND ORDER

On September 20, 1968, Trial Examiner William Seagle issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed a brief in answer to the Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and the entire record in this case,[1] and

[1] Although counsel for the Respondent alluded to a union grievance hearing which held that Batcheller was discharged for cause, no evidence was introduced by the Respondent, with respect to that proceeding.

hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Arfim Transportation System, Inc., Hammond, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C. January 27, 1969.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Sam Zagoria, Member
National Labor Relations Board

(Seal)

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[2] In adopting the finding that employee Everett Batcheller was discharged for his protected concerted activities, we specifically disavow that portion of the Trial Examiner's reasoning that the Respondent knew that a criminal prosecution for the alleged theft of the tarpaulin would not prove successful.

APPENDIX C

United States of America

Before The
NATIONAL LABOR RELATIONS BOARD

Division of Trial Examiners
Washington, D.C.

Case No. 13-CA-8230

Artim Transportation System, Inc.
and
Everett W. Batcheller, Individual

TRIAL EXAMINER'S DECISION

Charles E. Murphy, Esq., of
Chicago, Ill., for the
General Counsel.

George Gregory Mantho, Esq., of
Detroit, Michigan, for the
Respondent.

Statement of the Case

Upon a charge filed on January 23, 1968; a complaint issued on July 3, 1968 by the Acting Regional Director of Region 13, in which it was alleged that the respondent had violated Section 8(a)(3) and (1) of the Act by discharging Everett Wayne Batcheller, one of his employees; and the answer of the respondent denying the commission of any unfair labor practice, I, William Seagle ,the duly

designated Trial Examiner, heard this case at Chicago, Illinois, on August 7 and 8, 1968.

Subsequent to the hearing, counsel for the General Counsel and for the respondent filed briefs with the Trial Examiner.

Upon the record so made, and in view of my observation of the demeanor of the witnesses, I hereby make the following findings of fact:

I. *The Respondent*

Artim Transportation System, Inc., the respondent in the present proceeding, is an Indiana corporation, which at all material times has maintained its general office at 7105 Kennedy Avenue, Hammond, Indiana, and a city terminal at 165th and Summer Streets, Hammond, Indiana, from which it has been engaged in the interstate trucking and cartage business as a common carrier of iron, steel and other general products.

During the calendar year 1967, the respondent, in the course and conduct of its business operations, received gross revenues in excess of $1,000,000, of which more than $50,000 was received as the result of its interstate operations.

The respondent admits that at all material times it has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and I so find.

II. *The Labor Organization Involved*

Local 142, International Brotherhood of Teamsters, is a labor organization which maintains contractual relations with the respondent.

III. *The Unfair Labor Practice*

Everett W. Batcheller, whose discharge is in issue in the present proceeding, was one of more than a hundred Artim truckdrivers[1] operating out of its City Division located at 165th and Summer Streets, Hammond, Indiana.[2] Batcheller commenced his employment with Artim in September 1961, and he was terminated by the respondent as of November 30, 1967, which would be after more than 6 years of employment. Batcheller was not actually working, however, at the time of his discharge. He had been hospitalized and had undergone a hernia operation from which he was recuperating when he received his letter of termination.

The crux of the case is the respondent's motive in discharging Batcheller. The respondent advances as the reason for his discharge the theft by him of one of the tarpaulins which were used by the company to cover its steel loads during transport. The General Counsel contends, on the other hand, that the reason for his discharge was his previous concerted activity, which consisted of the presentation of many grievances to the respondent, and to the union.

There can be no doubt about the extent to which Batcheller was involved in the presentation of grievances. He was, apparently, a contentious individual, and there is no doubt that in 1967 he became the stormy petrel of the Artim transportation system. There was a standing feud,

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[1] Batcheller himself testified that from 100 to 130 drivers operated out of the City Division of Artim but John J. Harkema, the chief dispatcher of this Division put the number at about 150.

[2] Artim also operates another division known as the Road Division located at Kline Avenue in Hammond, Indiana.

moreover, between him and John J. Harkema, the chief dispatcher of the City Division, who regarded Batcheller as a thorn in his side. This characterization is Harkema's own, for he testified that he may have mentioned it to Stephen J. Kanuch, the Artim general manager.

Although Batcheller had long harbored ill-feelings towards Harkema, he first came into open conflict with his superiors in the managerial hierarchy of Artim[3] in May 1967. One of Batcheller's fellow truckdrivers, whose name is William Wayne Estes, was discharged by the respondent on May 6, after only 5 days of employment. Estes had previously worked for Artim but had left voluntarily, and he had been reemployed by Artim on May 1, 1967. As Estes had not yet completed his 30-day probationary period, he could not file a grievance with the union contesting his discharge. But he found a ready champion in Batcheller who took up the cudgels in his behalf. It seems that Estes had a speech defect which made it difficult to understand him on the two-way radio, and also that he had difficulty with his paperwork due to his poor education. Nevertheless, Batcheller regarded Estes as a hard and conscientious worker who has been able to surmount his difficulties, and he regarded it as particularly unjust that Estes, who had another job at the time, should have been reemployed with full knowledge on the part of the Artim management of his limitations, and then discharged after so short a period of employment.

When Batcheller came to work the Monday morning fol-

[3] In addition to Kanuch, the terminal manager, and Harkema, already mentioned, this also included George J. Huizenga, Supervisor of Safety, Personnel and Labor Relations; Ralph R. Artim, the president of Artim; and Ralph D. ("Bud") Artim, his son, who is vice president of Artim.

lowing discharge of Estes, he went to see George Huizenga, who was in charge of labor relations, to discuss the discharge, but he received no satisfaction from the latter. That same night—Batcheller then worked on the night shift—he drew up what he described as a "petition"—it was actually a document in letter form headed "Notice to Whom it May Concern—" in which he protested the discharge of Estes in most emphatic terms and demanded that he be put back to work. Batcheller was hardly conciliatory towards those whom he deemed to be responsible for the discharge of Estes, for he declared: "It is also my opinion that Mr. Estes would have been a far greater asset to the company as an employee than the individual that caused him to be discharged will ever be." He declared: "The party or parties that were responsible for this man's discharge . . . should be very proud of themselves to say the least and I can honestly say I would never advise anyone to seek employment with Artim especially if they were already employed elsewhere as Mr. Estes was, because like Mr. Estes for no good reason they would find themselves out of a job period."

Having prepared his protest on the discharge of Estes, Batcheller proceeded to solicit signatures to the document from his fellow-drivers. Seventy-nine of the drivers, in addition to Batcheller, signed it. The signatures were obtained on the Monday and Tuesday following the discharge of Estes. As usual, Batcheller worked on the night shift on Monday but he came in also on Tuesday to solicit signatures from the daytime drivers. While he was doing so, Huizenga came into the drivers' room, and obtaining a copy of the letter from one of the drivers, read it. Huizenga then made a speech to the drivers who were present defending the company's action. He attributed

the discharge of Estes to the fact that in the 4 days that he had been working for the company, he had torn up a dump truck, and had been barred from the premises of several of Artim's customers. After making his speech, Huizenga left the drivers' room, and did not interfere any further with Batcheller's solicitations of signatures to his protest.

Batcheller did not rest content, moreover, with the composition of this letter of protest to which he had obtained the signatures of 779 of the drivers. A few days later, he also composed a letter to Ralph A. Artim, the president of the company, and presented it to the latter in person. This letter was somewhat calmer in tone than Batcheller's previous letter but no more diplomatic. Ralph Artim promised Batcheller that he would investigate the case but Estes was never restored to the Artim payroll, despite the fact that Batcheller had assured Artim that he had investigated the charges of the Artim customers against Estes and found them to be false. One cannot help but wonder at the thoughts that must have passed through the mind of Artim as he pondered the paragraph in the letter in which Batcheller had warned:

> If by chance I have made a mistake in writing to you on this matter and if by chance I am wrong in thinking that you would want to see that this matter was corrected and nothing comes out of this as far as you are concerned, then I will take it for granted that I have misjudged you as a fellow human being and that you have no compassion for others or their feelings or well being. I will also know for my own benefit at least that Artim could care less as far as employee's moral (sic) is concerned and that employee and employer relationship means absolutely nothing to you.

On Monday of the following week, which would be May 15, when Batcheller reported for work at about 4 p.m. and walked into the drivers' room, Huizenga told him that Kanuch, the terminal manager, wished to see him in his office. In the interview that followed, Kanuch told Batcheller that the company was rather unhappy about the letters that he was writing and posting on the bulletin board, and that in the future he was not to post anything on the bulletin board in the drivers' room unless he first secured the approval of the company. Batcheller asked Kanuch why he should be denied the privilege of posting anything on the bulletin board when the other drivers were allowed to post whatever they desired on the bulletin board but to this question he received no answer. Nevertheless, Batcheller told Kanuch that he would comply with his instruction.

Batcheller only complied, however with this instruction in a narrow, literal sense. That very same night he composed a letter, which he entitled: "Subject: Rights of Others," and in which he protested against the denial to him of the right to post letters on the bulletin board because of his championship of Estes. He refrained from posting this letter on the bulletin board, but he had about a dozen photocopies made of the letter and left them on the table in the drivers' room where they could be seen and read by his fellow drivers. He also had made approximately 100 photocopies of his original letter on the discharge of Estes, and also left these on the table in the drivers' room. Although he did not deposit all of them there at the same time, Batcheller gave one of these copies to Estes himself as a memento of the controversy, and someone (not Batcheller himself) posted one of the copies of the letter on the glass-enclosed bulletin board that was

used for official announcements, as opposed to the open bulletin board that was for the general use of the drivers. Either late the same week or during the following week, Huizenga noticed the letter on the bulletin board, and took Batcheller to task for posting it but the latter denied that he had had anything to do with it. Under date of May 31, 1967, Estes wrote Batcheller a note of appreciation and thanks for the latter's efforts in his behalf. Batcheller also had photostatic copies of Estes' note made, and left them in the drivers' room.

As a driver on the night shift Batcheller's hours began at 4 p.m. During the last full week in May, Batcheller's starting time was changed from 4 to 3 p.m. He discussed the change with Huizenga and Harkema, and he accused the latter of discrimination against him. Harkema denied the accusation but Batcheller nevertheless demanded that he be paid time and a half for the hour from 3 to 4 p.m., as required by the provisions of the union contract. When he was refused time and a half for the earlier hour, Batcheller called Jake Abshire, the union business agent, who secured it for him.

Harkema denied that he was attempting to discriminate against Batcheller by changing his starting time from 4 to 3 p.m. He explained that he made the change, so that Batcheller might "get two loads to each customer per day." But he admitted that he did not change the starting time of any other driver. If it was so important that Batcheller should service a customer twice during his shift, why was it not equally important that the other drivers should also do so. Clearly Harkema's motive must have been discriminatory.

That it was so in fact is established by the testimony of Herman Parton, who was night dispatcher at the time but

who was subsequently discharged by the respondent. Parton testified that in May 1967, about 2 weeks after the discharge of Estes, he was called to a meeting where he found "Bud" Artim, Harkema, and Earl Hoover, one of the dispatchers, and that at this meeting he was instructed to change Batcheller's starting time from 4 to 3 p.m., and to cut Batcheller off at 8 hours, i.e. to hold his overtime down. Practically all the drivers on the night shift were then averaging about 20 hours a week in overtime.

The respondent attacks Parton's credibility in view of his discharge, but I accept his testimony, notwithstanding the fact that his discharge could conceivably have led him to harbor resentment against the respondent. Moreover, the respondent did not call either "Bud" Artim or Earl Hoover as witnesses to deny Parton's testimony, and although Harkema was called as a witness, he was not invited to deny the occurrence of the meeting. The respondent did produce payroll records showing that Batcheller had worked some overtime in the months of *July* (after the night shift had been abolished), August, and September but this hardly proves that he worked any considedable amount of overtime in May and June.

During the month of June there appear to have been no storm clouds on the Artim horizon. But early in July Batcheller took pen in hand again to protest what he considered another outrage. On July 5, 1967, one of the Artim drivers by the name of Alfred Campbell landed in jail for driving a load that was overweight. According to the testimony of Huizenga, Campbell and another Artim driver were to pick up a piece of machinery at Verson Allsteel in Chicago, and deliver it to a company in Sterling, Illinois; as both loads would be overweight, the company secured state permits covering the total gross weight of each load;

instead of picking up his scheduled load, Campbell picked up another load, and, passing over the state scale was arrested for overweight; he (Huizenga) spoke to Campbell and told the latter that in view of his negligence in not weighing his load or reading his permit, the company would hold Campbell personally responsible for paying the fine; Campbell was suspended and filed a grievance with the union grievance board which ruled that Campbell should be put back to work with backpay for time lost but that if he were found guilty of an offense, he should personally pay the fine; Campbell quit his job with Artim and never paid the fine, which had to be paid by Artim under its bond.

As soon as Batcheller heard what had happened to Campbell, he spoke to him and his wife, and decided to make the latter's cause his own, and that of all the other drivers. He drew up a document "in behalf of not only Mr. Campbell," he testified, "but all of the Artim drivers so that they could be made aware of the position that they were in if they continued with the habit of carrying overweights and illegal loads, that they might consequently be stuck to pay the fine." The document was an essay of nearly 850 words on the subject of "Oversize and Overweight Loads." In only the first paragraph of the essay did Batcheller deal with Campbell's case: he related that he had spoken to Campbell and learned that the permit which he had been given was indecipherable, and that, consequently, he had read the permit of the other driver and assumed that his was the same. For the rest, Batcheller expressed the views that a driver should not be forced to pay a fine "even if the driver is one-hundred percent in the wrong;" that an employer assumes responsibility for his employees "the same as a gambler assumes a risk"; that an employer could, of course, discharge an erring employee but then his guilt should be provable "beyond the shadow of a doubt." Batcheller concluded his observa-

tions by warning his fellow-drivers that if they did not wish to find themselves in the same position as Campbell they make sure that [if] they were operating legally in every respect before moving any load, and demand two witnesses if ordered to move a load about which they had any doubt.

Batcheller had photocopies made of his essay on oversize and overweight loads. He gave some of the copies to Campbell, and left the rest on the table in the drivers' room. He also spoke personally to some of the drivers on the subject, who in turn spoke to Huizenga about it. Under date of July 26, he received a letter from Artim, signed by George Huizenga, in which he was reprimanded for intentionally falsifying his I.C.C. logs for the month of May by entering incorrectly the number of his "on duty" hours. Most of the other Artim City Division drivers received similar letters of reprimand but only Batcheller filed a grievance with the union, which was heard by the Calumet Area Joint Grievance Committee on September 27. Huizenga, Kanuch and "Bub" Artim attended the hearing on the grievance, and the latter accused Batcheller of insinuating that the company would purposely break the law, and of complaining to the Interstate Commerce Commission, which, as a result, was investigating Artim. Batcheller admitted that he had called the I.C.C. but only to find out whether "the company could actually unload the whole burden of guilt onto the drivers by writing these letters of reprimand." Batcheller's grievance was rejected by the union grievance committee.

The morning after the hearing before the union grievance committee Batcheller, while he was on a run to the Inland Steel Company in East Chicago, was informed that Ralph Artim, the president of Artim, wished Batcheller to call him. Batcheller did so, and in the ensuing telephone con-

versation, Artim told Batcheller that the company had an application with the I.C.C. for new operating authority, which he had endangered by filing his grievance. Artim also stated that he was aware that Harkema had been harassing him but assured Batcheller that Harkema would harass him no longer if he would agree to a 30-day cooling off period during which he would file no grievances and write no letters. When Batcheller agreed to this proposal, Artim mentioned that he felt that Batcheller had been disrespectful of him in some of the letters that he had written during the Estes incident, but Batcheller assured Artim that he had meant no disrespect, and that in fact he had only contacted him in the matter because he had the highest regard for him.

At about the time of his telephone conversation with Ralph Artim, Batcheller also found an envelope in the rack with his timecard. The envelope contained a note typewritten in capital letters and headed "Loyalty." The note read as follows:

> IF YOU WORK FOR A MAN, IN HEAVEN'S NAME WORK FOR HIM, SPEAK WELL OF HIM AND STAND BY TH (SIC) INSTITUTION HE REPRESENTS.
>
> REMEMBER—AN OUNCE OF LOYALTY IS WORTH A POUND OF CLEVERNESS. IF YOU MUST GROWL, CONDEMN AND ETERNALLY FIND FAULT, RESIGN YOUR POSITION AND WHEN YOU ARE ON THE OUTSIDE, DAMN TO YOUR HEART'S CONTENT: BUT AS LONG AS YOU ARE PART OF THE INSTITUTION, DO NOT CONDEMN IT. IF YOU DO, THE FIRST HIGH WIND THAT COMES ALONG WILL BLOW YOU AWAY, AND PROBABLY YOU WILL NEVER KNOW WHY.

The note was unsigned and its authorship is not established.

Naturally, Batcheller did not allow the "loyalty" note to go unanswered. Within 3 hours he had prepared a reply to the note, had about a dozen photocopies made of the note, and deposited them the next morning on the table in the drivers' room. Batcheller's reply to the loyalty note was more than six times as long as the note itself. However, its key paragraph was perhaps its fourth that read as follows:

> There are three forms of loyalty, false loyalty, where just one pretends to be loyal, loyalty obtained by the use of force and then there is true loyalty obtained by earning it, and by doing unto others as you would like them to do unto you. If you have the loyalty mentioned last then in all probability you will also receive the respect and integrity of the individual or individuals.

Having set forth the three forms of loyalty, Batcheller proceeded to outline what an employer must do to inspire loyalty in his employees. So far as this theme was concerned, Batcheller declared as follows:

> I will tell you what the employer is obligated to do and that is to treat each and every employee fairly and without prejudice regardless of race, religion, political affiliation or for his rights to protect guaranteed under the Constitution of the United States of America. If all employers made a practice of treating their employees fairly and also seeing to it that those who are put in charge of supervising said employees did the same, then there would be no need for protest, labor organizations, labor laws to protect the employee and the Labor Relations Board to see

to it said laws were obeyed, and the employer would find that he had the loyalty, integrity and respect that the employee is expected to give in return.

Early in October, 1967, Batcheller's wife, Mary Batcheller, went to the Artim offices in Hammond, Indiana, in connection with a garnishment of Batcheller's wages. This was a predicament in which Batcheller not infrequently became involved, and there were a number of attempts to garnish his wages, much to the annoyance no doubt of his employers. On the occasion of Mrs. Batcheller's visit she saw Kanuch, the terminal manager, in his private office. The Artim management had just made an attempt to withhold Batcheller's paycheck but had countermanded the order. Mrs. Batcheller asked Kanuch, whether her husband could come back to work in the morning, and the terminal manager, after making a telephone call to someone, told her that they wished him to report at his regular time. After a moment, Kanuch remarked to Mrs. Batcheller that her husband was quite talented. She asked Kanuch what he meant, and he replied; "Well, these letters he has been writing. If he would devote this much energy to the company, to the betterment of the company, he would be a great asset to the company. Could you talk to him about these letters he has been writing. They're just causing hard feelings." Mrs. Batcheller agreed to talk to her husband about it. Kanuch, in the course of his conversation with Mrs. Batcheller, also commented that Batcheller semed to have a thorn in his side, and Mrs. Batcheller attributed this to the constant harassment that he was subjected to by Harkema. "He comes home almost every night nervous and upset," she told Kanuch, and the latter agreed to see what he could do to put a stop to Harkema's picking on Batcheller.

During the month of September Batcheller had begun to be assigned to driving an old model International Tractor, No. 9129, which had been purchased in 1959 or 1960, and which was in 1967 in the so-called dead line list. This consisted of trucks no longer fit for further use unless they underwent extensive repairs. Batcheller complained about his equipment assignments but during the months of September, October and November, he was assigned to drive No. 9129 twelve times. Huizenga testified that other Artim drivers with even greater seniority drove trucks of the same class and vintage during the 3-month period, but he did not specify how often they drove them, nor whether their trucks had been previously in the dead line list. Parton testified, moreover, that he was instructed by Earl Hoover to take No. 9129 out of the dead line list and give it to Batcheller to drive.

Batcheller never came back to work after the attempt to garnishee his wages. He was extremely nervous and upset and his back was giving him trouble. On October 9 or 10, he entered the hospital, and it was while he was in the hospital on this occasion, a stay that lasted a little less than 2 weeks, that he had his hernia operation. While he was convalescing from his operation, there occurred the chain of events that led to his discharge.

It is necessary at this point to say something concerning the nature of the Batcheller homestead. Its mailing address was Box 88, Rural Route 1, Lowell, Indiana, and it was located about 6 miles off Route 41 on a gravel road in a populated but rather isolated area known as Wildwood Shores that bordered on the Kankakee River to the south of it. For a stranger, it would be hard to find Batcheller's house even after a first visit. Batcheller had his property posted against trespassing, moreover, and he boasted that he had secured no less than seven convictions for trespass-

ings against persons who failed to respect his privacy. Yet now, utterly unknown to him, he had another unwelcome visitor, apparently, and he was none other than John T. Harkema.

According to the testimony of Harkema, he was on vacation during the second week of November and one day as he was engaged, with a friend, in duck-hunting, he just happened, as he put it, to "stumble" on Batcheller's property; he and his friend were following a flight of ducks in their car over country roads when they came upon Batcheller's house. Harkema noticed, he testified, that "there was tarpaulins on the roof of his house, over a chimney which would be over a fireplace; a tarpaulin over the entrance to the garage; a tarpaulin over a car that was standing in the middle of the backyard."

The testimony of Harkema seems to be that he was duck hunting on November 13 when he stumbled on Batcheller's house, but there is reason to doubt the accuracy of this date, since Harkema also testified that he was only on a week's vacation, which began on Monday, November 6. If he was on a week's vacation, he would have been due back to work on Monday, November 13, and he would not have been engaged in duck-hunting on that day. This is not a matter of inference only, moreover, for despite the fact that he had testified that he stumbled on Batcheller's house on November 13, he also definitely testified that he was back at work on November 13.

In any event, whether Harkema was actually duck-hunting with a friend, and whether they did so on November 13 or some other date, he also testified that on this occasion there was nothing to indicate to him that he had also stumbled on tarpaulins that were Artim property. He nevertheless reported what he called the "incident" to Kanuch, the terminal manager. Thus Harkema testified:

Q. Well, with reference to the tarpaulins that you saw, did you see anything that day that would lead you to believe that they were Artim property?

A. Not at that time, no, sir.

Q. All right. After you returned from your vacation, which was on the 13th, what did you do?

A. I reported this incident to Mr. Kanuch, the terminal manager.

Q. What incident?

A. Of seeing the tarps on Mr. Batcheller's property, and also how I stumbled on his property.

It seems, moveover, that Kanuch upon being told about Harkema's visit to Batcheller's house, instructed the latter and Huizenga to ride out there. This they did, it is clearly establish, on November 17, for all three witnesses who testified as to this visit, Huizenga, Harkema and Batcheller himself, agreed on the date of the visit. All three witnesses also agreed in general as to what occurred and as to what was said during the visit with some qualifications that are very significant, however.

Harkema testified that he arrived with Huizenga at Batcheller's house "after having trouble with finding it again." Leaving Huizenga in the street in their car, he went to the back door of Batcheller's house and knocked but received no answer. Seeing a light in the garage, he went over there and hollered "Batcheller," and again received no answer. There was a tarpaulin hanging over the door, covering the entrance over the garage, and when he looked at it, he saw the name "Artim" on it, although it was upside down. He went back to the car to tell Huizenga what he had seen, and the latter took a picture of the tarp. Huizenga then left the car and went to the door of the house while Harkema sat in the car and soon the latter heard

voices in the yard, and headed for the house. He found Huizenga talking to Batcheller, who invited them into the house. In the ensuing three-party conversation, there were also three subjects discussed (1) Batcheller's operation, (2) a fire that had taken place in Batcheller's house several years ago, and (3) the relations in the past between Batcheller and Harkema. So far as the discussion related to Batcheller's operation, Harkema testified that he did not know that Batcheller had had an operation while he had been in the hospital, because when he had telephoned to Batcheller while he was hospitalized the latter had told him that he was in the hospital for a nervous condition caused by him. During the discussion of his operation, Batcheller showed him and Huizenga the scar resulting from his operation. The discussion of the past relations between Batcheller and Harkema occurred as he was leaving the house with Huizenga. As Batcheller was seeing them to the gate, he said to Harkema: "John, let's bury the hatchet," and Harkema replied: "Batcheller, I have no hatchet to bury." The two shook hands, and Harkema departed with Huizenga. During the entire conversation neither Harkema nor Huizenga mentioned the subject of tarps, and of course, neither of them accused Batcheller of stealing an Artim tarpaulin.

The testimony of Huizenga concerning the visit of November 17 to Batcheller's house is in substantial agreement with that of Harkema, except for the discussion of Batcheller's operation. As to this Huizenga testified: "The first thing we talked about was his recent operation. And after some discussion, he said, 'I don't suppose you believe that I had any surgery.' He said, 'Look, I will show you.' So he showed us his scar. *We assured him that we knew that he had been operated*" (emphasis supplied). This is diametrically opposed to the testimony of Harkema that

he knew nothing about Batcheller's operation at the time of the visit.

The testimony of Batcheller concerning the November 17 visit of Harkema and Huizenga is fuller with reference to the topics discussed and reveals how he became aware of the presence of his visitors. He testified that at the time of their arrival he was asleep in bed on the second floor of the house and that the house was deserted except for himself. He heard his dogs barking, got up and looked out of the window. He saw Harkema and Huizenga standing in his driveway, and went downstairs to open the door to them. Huizenga stated that *he and Harkema had been out hunting ducks in his area, and, seeing his house had decided to drop in to see "how 'good old Batch' was getting along."* Huizenga inquired about his illness and about when he would return to work. When he seemed to imply that there was nothing wrong with him and that he had never had an operation, he pulled down his pants and showed them his scar. Then Harkema entered the conversation and remarked to him: "Your writing these letters to Mr. Ralph Artim about me. You're just wasting your time." He replied: "Well, I don't know, maybe I am," and offered the olive branch to Harkema; he said that he would be more than happy to forego any hard feelings he had against him if he would treat him like another human being. But Harkema irritated him by attempting to minimize the extent of the fire in his house, which had involved $14,000 in damage, and he became so "hot under the collar" that he invited Harkema to leave, which he did.

When Huizenga reported to Kanuch about the November 17 visit to Batcheller, the terminal manager remarked to Huizenga: "Let me think about this for a couple of days." Kanuch then instructed Huizenga to pay another visit to Batcheller, accompanied by officers from the Lake

County Sheriff's office at Crown Point, Indiana. Huizenga made this visit on November 22, and the two officers who accompanied him were Detective Bernard Bagley and Detective Ted Nowakowski.

When Huizenga, accompanied by the two detectives arrived at Batcheller's house, Batcheller was lying under his son's car, on which he had been working, and which was covered with a tarpaulin. Batcheller got out from under the car and asked Huizenga: "Just what the hell can I do for you today?" Huizenga informed Batcheller that he was there with the detectives to recover some company property in his possession. "Just what company property are you talking about?" asked Batcheller. Huizenga then explained that when he and Harkema had been there previously they had seen tarps in the garage. "What were you doing in my garage?" asked Batcheller. "I didn't know you was in my garage." Huizenga replied: "Well, we didn't think you was at home." Batcheller told Huizenga that most decent people who came to his home knocked on the door, and left if nobody answered. When Huizenga indicated he wanted to look around, Batcheller asked whether his visitors had a search warrant. Bagley replied in the negative but indicated he could obtain one if necessary. Batcheller then told his visitors that he had nothing to hide, and that if they wanted to look around the property, they could do so. Huizenga after walking around the porch of the house walked over to the car on which Batcheller had been working, and asked the latter to undo the ropes that held the tarpaulin on the car. Batcheller complied with the request, and, after Huizenga had examined the tarpaulin, he exclaimed that it had had the name "Artim" on it but that Batcheller had scrubbed it out. Batcheller told Huizenga that the tarp may have had Artim's name on it because Jimmy Mills who repaired tarps

for Artim had given him "several old raggedy tarps." He also warned Huizenga that if he intended to retrieve the tarp he better be prepared to prove it was Artim's tarp. Huizenga and the detectives then left without the tarpaulin.

Huizenga's testimony concerning the November 22 visit to Batcheller's house is substantially to the same effect as Batcheller's but, again, there are two important differences, although these differences are largely in emphasis. Huizenga's testimony was that he was looking for the tarpaulin which he and Harkema had seen hanging over the garage doorway during their visit to the premises. Thus Huizenga testified that when Batcheller asked him what he wanted he replied: "Batch, we would like to inspect the tarp that we saw *yesterday*[4] hanging over the doorway of your garage" (emphasis supplied). The second difference between the testimony of Batcheller and Huizenga concerning the November 22 visit is that while the former merely advanced as a possibility that he may have obtained the tarpaulin over the car from Jimmy Mills, the latter put it in terms of a definite fact, i.e. that he had obtained the tarp from Mills. Thus Huizenga testified that Batcheller told him: "I will tell you where I got that tarp. I got that tarp from Jimmy Mills."

The two detectives who accompanied Huizenga on November 22 were called as witnesses by the respondent. Detective Bagley testified that he was there with Detective Nowakowski merely to see that "there was no trouble" rather than to gather evidence for a persecution, and confirmed that they had made the visit without a search warrant. Detective Bagley testified that the tarpaulin they

[4] Huizenga must have misspoken when he referred to "yesterday" as the date of the visit.

saw that day was an old tarp that was weatherbeaten and discolored in places, looking as if it had been in contact with oil. Detective Bagley also testified that the tarpaulin had the painted letters "A-R-T-I-M" on it but the letters had been scrubbed off or worn off. Although Huizenga had testified that the tarpaulin seen by him had white painted letters on it, Detective Bagley testified, however, that he saw no such letters on it. As for Detective Nowakowski, who was standing behind Detective Bagley, the former testified that, although he could see an imprint on the tarp, he could not make out what the letters were.

The respondent did nothing about recovering the tarpaulin or prosecuting Batcheller for its alleged theft. Nothing was said to Batcheller, moreover, when on November 28, he was asked to take a physical examination before returning to work. A company doctor gave him the physical that same day, and he passed it with flying colors. Everything was normal, including his vision, which was indeed 20/20, an undoubted asset in a truckdriver. Yet 2 days later Batcheller was discharged by the respondent for stealing a company tarpaulin. He filed a grievance with the union but it was rejected by the Greater Calumet Grievance Committee.

B. *Concluding Findings*

Counsel for the respondent seems to assume as a self-evident proposition that Batcheller stole one of the Artim tarpaulins, and devotes his best efforts to discrediting Batcheller as a witness. The attack on Batcheller's credibility is based primarily on his involvements in garnishment proceedings, his allegedly "false" testimony relating to the withholding of his paycheck, and his testimony relating to his concerted activities. Indeed, counsel for the respond-

ent goes so far as to assert: "The fact that Batcheller's explanation for the discharge of Estes and Campbell differs from the company's explanation further serves to weaken Batcheller's credibility." All this is fallacious, if not frivolous. The fact that Batcheller may have had trouble in meeting his bills does not establish his mendacity. There can be not the slightest doubt that the respondent temporarily withheld Batcheller's paycheck on one occasion, and this is indeed admitted by the respondent. So far as the Estes and Campbell affairs are concerned, both Batcheller and Huizenga could have sincerely entertained differing views on the merits of the controversies, and there is in fact no occasion to decide the merits of either controversy, for Batcheller's concerted activities were no less protected even though his championship of the causes of Estes and Campbell may have been wholly wrong.[5] That he engaged in these activities is firmly established by documentary evidence which makes his credibility quite irrelevant, and insofar as other questions of fact are concerned, those relating to his alleged theft of the tarp, the discrimination against him and the interferences with his presentation of grievances, Batcheller's own testimony either stands wholly uncontradicted or is corroborated by the testimony of other witnesses for the General Counsel, as well as by witnesses for the respondent. Batcheller's testimony is lent further credence, moreover, by the failure of the respondent to call many witnesses who should have been called because they obviously had knowledge of the matters in issue. The respondent failed to call as witnesses either Ralph Arling, who had several contracts with Batcheller or "Bud" Arling who attended the meeting with Parton. The respondent also failed to call Kanneh as a

[5] *See Mushroom Transportation Co., Inc.*, 142 NLRB 1150 and 1158, and earlier cases there cited.

witness, despite the fact that he was the key figure in the discharge of Batcheller and made everyone of the important decisions that led to his discharge. Most important of all the respondent failed to call Jimmy Mills as a witness, and attempted to overcome the lack of his testimony by offering hearsay through the mouth of Huizenga, who clearly showed himself to be both an evasive and untruthful witness.

The indications of Huizenga's unreliability as a witness are many. His evasiveness was shown, for example, when he was being examined as to whether he would regard Batcheller as a good truck driver. With respect to this, he testified as follows:

Q. Was he a good truck driver?

A. Do you mean to be able to turn on the key and to shift, and so forth?

Q. Yes.

A. Yes.

Q. The thing you hire people for.

A. Yes this part of it. You are asking if he is a good truck driver. As far as the mechanics of the truck are concerned.

Q. Is he?

A. Yes.

Surely, as Director of Safety and Personnel, Huizenga knew perfectly well that counsel for the General Counsel must have been interested in far more than whether Batcheller could turn an ignition key. Another illustration of Huizenga's evasiveness occurred when he was asked whether there was any other truck driver who had filed more grievances than Batcheller. Huizenga testified that he found it "difficult to say." Asked whether it was not true that Batcheller was stirring up a lot of trouble, Huizenga

replied that many of the drivers treated the Estes and Campbell incidents as "humorous." Yet over a majority of them had signed Batcheller's "petition," and it is difficult to see how fines for overweight would have any humorous aspects for truck drivers.

There are also a considerable number of examples of Huizenga's untruthfulness. There is his testimony that during the visit made by him and Harkema to Batcheller on November 17 the two of them assured the latter that "we knew that he had been operated," although Harkema testified that he did not know at the time that Batcheller had had an operation. If Harkema did not know, it is difficult to understand from what source Huizenga had obtained this knowledge. It is even more difficult to understand why Batcheller should have shown his visitors his scars unless they had expressed some doubt that he had had an operation. As to the November 22 visit to Batcheller, Huizenga testified on direct examination that he was instructed to call the sheriff's office and ask for two officers to accompany him to Batcheller's home but on cross-examination he denied that had called the sheriff's office or that Kanuch, who, obviously, was giving all the instructions as to the handling of the matter, had called the sheriff's office, and thus left himself in the position of failing to comply with his instruction. Then, when he was asked, why on November 22 he had not removed the tarpaulin, which he claims to have clearly identified, from Bacheller's premises, Huizenga explained that the reason was that the officers had a new car and they told him that they had a new car and did not wish to dirty it by putting the tarpaulin in it. But this was only one of Huizenga's uninspired fictions. Detectives Bagley and Nowakowski were not there to gather evidence but, as Bagley testified, to see to it that "there was no trouble." As a matter of fact, the sheriff's office had been

told that the tarp was stolen from the Hammond, Indiana, yard, and the Hammond police would be the ones that would be concerned with the actual theft. Artim had been advised by the sheriff's office, moreover, that it would be inadvisable to bring a prosecution against Batcheller, so that there was no occasion to gather any evidence. Furthermore, Bagley explicitly testified that no move was made either by him or by Huizenga "to actually roll up the tarp and take it."

It seems plain on the record as a whole that Batcheller engaged in concerted activities, including the presentation of grievances, which were fully known to the respondent's representatives, and that they reacted to these activities both by attempting to persuade him to abandon them, and by various warnings and acts of discrimination, culminating in his discharge for stealing, allegedly, an old, battered and oil-stained tarpaulin that had little or no value, and that in discharging him for this reason they acted on evidence of the flimsiest character.

The respondent not only concedes that its representatives knew all about Batcheller's activities but also seems to assert that these activities were even more extensive than claimed by the General Counsel, and that throughout the history of these activities, they never lost their patience or "cool." The respondent also seems to contend that too long a period of time elapsed between the Estes and Campbell incidents and the actual discharge of Batcheller for the discharge to be related to these activities. The record does not, however, support any of these contentions.

It is true that back in 1964—just before Christmas—Batcheller composed a humorous want ad in which he advertised for a riding saddle to present to Harkema so that he could ride out of town. Batcheller did not post this

want ad on the bulletin board, but after the Estes and Campbell incidents some person unknown did so. The want ad merely reflects the standing personal antagonism between Batcheller and Harkema, and has no connection with any concerted activities on the part of Batcheller or any other truck driver. Almost 2 years were to elapse before Batcheller began activities of this nature.

But once these activities commenced the patience of the respondent's representatives could not be described as saintly. The impression of saintliness can only be created by disregarding all the evidence relating to the warnings given to Batcheller, the discrimination practiced against him, and the attempts to get him to desist from his activities. But, even disregarding this evidence, the lapse of time between the Estes and Campbell incident and the discharge of Batcheller is not very great. The Campbell incident was in early July and while Batcheller's discharge did not occur until the last day in November 1967, it must not be forgotten that Batcheller was not actually at work during most of October and all of November but was undergoing medical treatment. While he was sidelined during these 2 months, the respondent's representatives were evidently looking for a pretext to get rid of him, and when they finally, after much apparent hesitation, decided to discharge him, their timing was absolutely perfect. They discharged Batcheller before the very day that he was scheduled to return to work.

The hesitation of the respondent's representatives until the very last moment is not at all surprising. They needed, above all, a plausible explanation of the discovery of the battered tarpaulin, for, unless the discovery were made to seem accidental, they would lay themselves open to the suspicion that they were looking for a pretext to get rid of Batcheller. This, they thought they had found, in Harke-

ma's duck-hunting story but the duck that he was hunting was Batcheller. Whether Harkema actually went duck-hunting with a friend—the friend was never identified or produced unless he was Huizenga—or made up the whole story, does not really matter very much. It would serve as a pretext in either event. Yet it is difficult to see how Harkema, even if he were duck-hunting, could "stumble" on Batcheller's house in a remote but populated rural area unless he had armed himself with Batcheller's address in advance. To have "stumbled" on Batcheller's house without this while pursuing ducks *in an automobile* strains credulity. Moreover, the fact that he returned a second time, although there was nothing except the tarps themselves to arouse suspicion during his first visit, indicates that the duck-hunting story was only an extra and superfluous embellishment.

Having decided to come back and look for a stolen Artim tarp, among the seven or eight tarps that were on Batcheller's premises, Huizenga and Harkema never seem to have been able to make their minds up as to whether he had stolen one or two, or if one, whether it was a tarp hanging over the door of Batcheller's car, or a tarp that was being used as a cover for the car of Batcheller's son. Huizenga testified concerning the alleged theft of the tarp both as a witness for the General Counsel and for the respondent. As a witness for the General Counsel, he constantly accused Batcheller of stealing two tarps but as a witness for the respondent, he accused him only of stealing one. It is evident that Huizenga and Harkema were nonplussed when during their second visit to Batcheller's house they could not find any tarp over the garage door. Apparently, they did not stop to ask themselves why, if the guilty Batcheller had made away with the tarp over the garage door because he was afraid that he might be accused of

stealing it, he had also not made away with the tarp covering his son's car. Indeed, they might have gone further and asked why he had not made away with all seven or eight of the tarps that were on the premises, for if he were going to be accused of stealing one or two of the tarps, he might equally well be accused of stealing all of them. Huizenga also does not seem to have reflected on the fact that Batcheller showed absolutely no consciousness of guilt when he was accused of the theft of the tarp but readily offered to show it to the detectives, although they had no search warrant. Huizenga also seems not to have been discouraged when neither of the detectives could see on the tarp the big letters in white paint that spelled "A-R-T-I-M". While Detective Bagley could see some imprints or letters, Detective Nowakowski could not decipher them at all, and both, it must not be forgotten, were called as witnesses by the respondent.

Despite the failure of positive identification, and the possibility that the tarp, even if it were an Artim tarp, might have been obtained legitimately from Jimmy Mills, Huizenga did not shrink in the end from discharging Batcheller for stealing a tarp that they could not prove he had stolen. Perhaps the most curious aspect of the case is that Huizenga made the visit of November 22 despite the fact that they had been advised that a prosecution either for stealing the tarp or for receiving it knowingly as stolen goods would not prove successful. Thus, the respondent is in a position of asking the Board to find Batcheller guilty of a theft on evidence which, they were advised, no criminal court would convict.

In conclusion, I should perhaps add that I realize full well that Batcheller was not the sort of person with whom it was easy to live. But the right to engage in concerted activities is not limited to those employees who would never

hurt an employer's feelings, or fail to observe to the fullest extent of the amenities of controversy. In any event, since the respondent did not discharge Batcheller for overstepping the bounds of decorum, I do not need to consider whether it would have been justified in discharging him for this reason. I decide only that he was not discharged for the reason assigned by the respondent, and that the real reason was his previous concerted activity.

IV. *The Remedy*

In view of the limited nature of the violation involved in the discharge of Everett W. Batcheller, I shall recommend only a form of cease and desist order restraining the respondent from discharging or otherwise discriminating against its employees because they may engage in concerted activities or they may present grievances to the respondent.

To remedy the discharge of Everett W. Batcheller, I shall also recommend, by way of affirmative relief, that the respondent offer to him immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and and privileges previously enjoyed by him, discharging, if necessary any new employee hired subsequent to the date of his discharge in order to replace him. I shall also recommend that the respondent make Everett W. Batcheller whole for any loss of pay he may have suffered by reason of his discharge by payment to him of a sum of money equal to the amount which he would normally have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings during the said period. The amount of back pay is to be determined in accordance with the formula prescribed in

F. W. Woolworth Company, 90 NLRB 289, and interest is to be computed on the amount so determined in accordance with *Isis Plumbing & Heating Co., Inc.*, 138 NLRB 716.

Conclusions of Law

1. The respondent, Artim Transportation System, Inc., is an employer engaged in commerce, or in an industry affecting commerce, within the meaning of Section 2(6) and (7) of the Act.

2. Local 142, International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Everett W. Batcheller on November 30, 1967, because he had persisted in engaging in concerted activities, and in the presentation of grievances, the respondent committed an unfair labor practice affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act.

Recommended Order

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend that the respondent, Artim Transportation System, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local 142, International Brotherhood of Teamsters, or any other labor organization of its employees, by discharging any of its employees, or in any other manner discriminating against them with respect to their hire or tenure of employment, or any term or condition of their employment because they

may engage in concerted activities or may present grievances to the respondent.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action in order to effectuate the policies of the Act:

(a) Offer to Everett W. Batcheller immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges and make him whole for any loss of pay he may have suffered by reason of the discrimination against him in the manner and to the extent set forth in Section IV of this Decision entitled "The Remedy."

(b) Preserve, and upon request make available to the Board, or its agents, for examination and copying all payroll records and other data necessary to give effect to the backpay requirement.

(c) Post at its general offices at 7105 Kennedy Avenue, and at its terminal known as the City Division at 165th and Summer Streets, both in Hammond, Indiana, copies of the notice attached hereto and marked "Appendix."[6] Copies of said notice, on forms to be provided by the Regional Director for Region 13 of the Board, shall, after having been duly signed by respondent's representative, be posted by

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[6] In the event that this Recommended Order be adopted by the Board, the words, "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

respondent immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by respondent to assure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the said Regional Director, in writing, within 20 days from the date of service of this Decision and Recommended Order of what steps Respondent has taken to comply herewith.[7]

Dated at Washington, D.C.

William Seagle,
Trial Examiner.

Appendix

NOTICE TO ALL EMPLOYEES

Pursuant To

The Recommended Order of a Trial Examiner of the

National Labor Relations Board

and in order to effectuate the policies of the

National Labor Relations Act

we hereby notify our employees that:

WE WILL NOT discourage membership in Local 142, International Brotherhood of Teamsters, or in any other labor organization of our employees, by discriminating with respect to the hire or tenure of their employment

[7] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing, within 10 days from the date of this Order what steps respondent has taken to comply herewith."

or any term or conditions of their employment, because they may engage in concerted activities, or may present grievances to us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them in Section 7 of the National Labor Relations Act.

WE WILL offer to Everett W. Batcheller immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges and make whole for any loss of pay he may have suffered by reason of our discrimination against him.

All our employees are free to become or remain, or to refrain from becoming or remaining members of any labor organization, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

Artim Transportation System, Inc.

(Employer)

Dated..... By.....

(Representative) (Title)

Note: — We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1st U.S. Courthouse and Federal Office Building, 219 S. Dearborn Street, Chicago, Illinois, Tel: No. [illegible]

SUPREME COURT, U.S.
JUL 17 1970
E. ROBERT SEAVER, CLERK

No. 287

In the Supreme Court of the United States

OCTOBER TERM, 1970

ARTIM TRANSPORTATION SYSTEM, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The judgment of the court of appeals (Pet. 2) was entered on March 19, 1970. The 90-day period for filing a petition for a writ of certiorari prescribed in 28 U.S.C. 2101(c) expired on June 17, 1970. No timely extension of time for petitioning was sought, and the petition was filed on June 19,

1970. The petition is untimely, the Court has no jurisdiction to entertain it, and it should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

JULY 1970.